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91-1661

Supreme Court, U.S.
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CASE NO.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL FERRIS
PETITIONER

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; RICHARD C. POND IN HIS CAPACITY AS MEMBER OF SAID BOARD AND INDIVIDUALLY; MAXINE ALBERS AND R. W. HOLMES IN THEIR RESPECTIVE CAPACITIES AS MEMBERS OF SAID BOARD AND INDIVIDUALLY.
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION III.

PETITION FOR WRIT OF CERTIORARI

Paul Ferris
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March 1992.

QUESTION PRESENTED FOR REVIEW

Whether the unlawful imposition of a general property tax by legislative act of a board of county commissioners violates a citizen's right to a Republican Form of Government as guaranteed by Article IV, Section 4 of The United States Constitution for which a citizen's right to petition for redress may not be impaired.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 30

I. The Republican Guarantee 32

II. Equal Protection and Due Process 38

VERIFICATION 52

TABLE OF AUTHORITIES

CASES:

Board of Assessment Appeals v. Benbrook, 735 P.2d 860 (Colo., 1987) 45

Bounds v. Smith, 430 U.S. 817, 52 L.Ed.2d 72 (1977) 43

Giaccio v. Pennsylvania, 382 U.S. 399, 15 L.Ed.2d 447 (1966) 40

Marbury v. Madison, 5 U.S.(1 Cranch) 137, 2 L.Ed. 60 (1803) 34

McKart v. United States, 395 U.S. 185, 23 L.Ed.2d 194 (1969) 44

McKesson v. Division of Alc. Bev., 495 U. S.___, 110 L.Ed.2d 17 (1990). 49, 50, 51

Minor v. Haypersett, 88 U.S. 162, 22 L.Ed.627 (1873) 35

Nixon v. Fitzgerald, 457 U.S. 731, 73 L.Ed.2d 349 (1982) 35

Pacific Telephone Co. v. Oregon, 223 U.S. 118, 56 L.Ed. 377 (1912) 33, 36

Simmons v. U.S., 390 U.S. 389, 19 L.Ed.2d 1247 (1968) 46

U.S. v. Cruikshank, 92 U.S. 542 (1875) 35

U.S. v. Lee, 106 U.S.(Otto)196, 27 L.Ed. 171 (1882) 34

CONSTITUTIONAL PROVISIONS AND STATUTES:

United States Constitution:

Article IV, Section 4 .... 3, 11, 30, 31
32, 33, 34, 37

First Amendment 3, 5, 10, 24
41, 42, 43

Fifth Amendment 3, 38

Fourteenth Amendment .. 3, 7, 10, 25, 31
38, 39, 43, 49

Colorado Constitution, Article II,
Section 6 ..... 3, 5, 25, 43

Federal Enabling Act for the state
of Colorado, Section 4 ..... 3, 36

42 U.S.C. 1983 8

Declaration of Independence 36, 37

Colorado Revised Statutes:

24-6-401, et seq. (State Open Meetings Law)
..... 3, 20, 22, 42

24-6-402(1) 21

24-6-402(2) 15

24-6-402(4) 14, 22

24-6-402(6) 15

Part 3, Article 1, Title 29 ... 2, 17, 18

29-1-301 4

29-1-303 ..... 4, 14, 17, 18, 42

29-1-303(1)(a) 14

29-1-303(1)(b) 14, 47

29-1-303(3) 14, 22, 47, 50

29-1-303(4) 14

29-1-303(5) 21, 22, 47

29-1-303(6) 14, 21, 22, 47, 50

29-9-101(Public Meetings Law) 3, 20
22, 42

29-9-101(1) 21

29-9-101(2) 14, 22

39-1-113 ..... 3, 9, 11, 38

39-10-114 ..... 3, 9, 11, 38

39-10-114(1)(a)(I)(B) 48, 50

A&R (Abatement and Refund at 39-1-113 and 39-10-114) 9, 10, 11, 12, 18, 22, 23 25, 26, 27, 28, 29, 30, 38 39, 40, 41, 42, 43, 44, 45 46, 47, 48, 49, 50

MISCELLANEOUS AUTHORITIES:

Hamilton, "Federalist" No. 84 35

Madison, "Federalist" No. 44 35

Madison, "Federalist" No. 39 35

SUPREME COURT
OF THE UNITED STATES

PAUL FERRIS
Petitioner
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; et al.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION III.

Petitioner Paul Ferris petitions for a Writ of Certiorari to the Colorado Court of Appeals affirmation of Colorado District Court dismissal of his complaint for declaratory and injunctive relief against the Board of County Commissioners of the County of Mesa, State of Colorado, and the commissioners individually.

OPINIONS BELOW

The unreported opinion of the Colorado Court of Appeals and order on rehearing are reprinted in the appendix. No. 89CA2137.

Oral findings and conclusions of Colorado

District Court for dismissal and two subsequent unreported written orders affirming oral dismissal are reprinted in the appendix. No. 89CV204.

Unreported orders of the Colorado Supreme Court denying certiorari and striking petition to reconsider are reprinted in the appendix. No. 91SC370.

JURISDICTION

The Colorado Court of Appeals, Division III, on April 25, 1991 entered judgment affirming district trial court dismissal. Rehearing was denied May 23, 1991.

Petition for Certiorari by Colorado's Supreme Court was denied Nov. 12, 1991.

Time for filing a petition in this Court has been extended to and including March 11, 1992. Application No. A-544.

Jurisdiction of The United States Supreme Court is invoked by 28 U.S.C. Sec. 1257. Also 28 U.S.C. Sec. 2403(b).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves these United States Constitution provisions: The Republican Guarantee of Article IV, Section 4; the right to petition Government for a redress of Grievances of Amendment I; the Due Process Clause of Amendment V, the Due Process and Equal Protection Clauses of Amendment XIV, Section 1.

This case involves the Federal Enabling Act to Colorado State Government, Sec.4.

This case involves the Equal Justice provision of Colorado Constitution, Article II, Section 6.

This case involves these Colorado Statutes: 24-6-401 (State Open Meetings Law); Part 3 of Article 1, Title 29; 29-9-101 (Public Meetings Law), 39-1-113, 39-10-114.

The pertinent text of these constitutional provisions and the statutes are set forth in the separate appendix volume.

STATEMENT OF THE CASE

In Fall, 1988, Respondent Board of County Commissioners of Mesa County (Com'rs) implemented exception procedures to collect revenues in excess of the property tax revenue increase limitation at 29-1-301, C.R.S. and adopted a 4-mill excess levy for budget year 1989 for capital expenditures, debt service for capital expenditures, and general operating budget[1] pursuant solely to "truth in taxation" public disclosure procedures at 29-1-303, C.R.S.[2] Petitioner Paul Ferris (Ferris) and others apprised Com'rs, on the record, of then known defects of procedure at public disclosure hearings held, prior to Com'rs' approval of the excess amount of revenue and adoption of the excess levy. Additionally Ferris gave Com'rs written notice and complaint on Dec 1, 1988, detailing the then known is-

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[1] Record: Exhibits C, D, 1, and 2.
[2] Record: Exhibit 1, Sections K, OO.

sues of this action.[3] Receiving no response, Ferris filed suit March 20, 1989, seeking declaratory and injunctive relief as to the legality and validity of procedures implemented and the resultant excess levy. Ferris brought this action as citizen/registered elector/property owner/property taxpayer, alleging injury individually to his several personages, though not necessarily same injury to each individual status, from the excessive governmental conduct subject of the Complaint.[4]

The Complaint was filed pursuant to United States Constitution First Amendment right "to petition the Government for a redress of grievances" and corollary Article II Section 6 Colorado Constitution guaran-

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[3] Record, Vol.I, COMPLAINT AND PETITION FOR REDRESS (stricken), p.26-30.

[4] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.4-5, 17-18; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.154, 156; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.144-145.

tee of "a speedy remedy for every injury to person, property, or character,"[5] alleging that Com'rs' legislative acts complained of were not within their lawful discretion, and therefore a cause of action and redress was available directly through the courts. The nature of the grievance was that the Com'rs' legislative imposition of a general property tax was by unlawful implementation of procedures, lawfully insufficient procedure and notice, and in violation of requirements of various applicable Colorado statutory public meetings/hearings requirements. "Since the Board does not enjoy discretion to abrogate citizens' rights, nor to violate laws of the General Assembly, including specific laws of procedure and process for taxation, a cause of action does lie in this case. The

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[5] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.5, 6; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.153.

Court here is not asked to substitute its judgment for that of the Board. The Court's jurisdiction is invoked for a determination of: (a) Did the Board violate law, binding upon the Board, in the matter of "truth in taxation" complained of? And if so, (b) by doing so, were rights, privileges, and/or immunities of Mesa County citizens, as a class, violated? If so, (c) were Plaintiff's rights, privileges, and/or immunities, as an individual, violated? (d) remedies."[6]

In addition to direct monetary injury, the Complaint alleged injury by virtue of deprivation of immunity of "no taxation without representation" and deprivation of rights, privileges and immunities secured by United States Constitution, Fourteenth

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[6] Record, Vol.I: BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.147; Also, COMPLAINT AND PETITION FOR REDRESS (stricken), p.20, 21.

Amendment and by 42 U.S.C. 1983.[7]

Relief was sought by means of Colorado statutory provisions for obtaining a declaratory judgment.[8] Ferris argued declaratory order and relief were available and the proper means of redress for these claims of unlawful imposition of a general property tax by legislative act, and for obtaining the relief sought here.[9] Nov. 8, 1989, at oral evidentiary hearing held solely on Ferris' motion for injunctive relief, the district court denied temporary injunction and orally dismissed the complaint pursuant to one or more of Com'rs' several motions for summary dismissal, prior to and without any hearing of said mo-

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[7] Record, Vol.I: BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.144, 145, 147; COMPLAINT AND PETITION FOR REDRESS (stricken), p.17, 18, 21.

[8] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.8-10, 22-24; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.153, 160-161; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p. 146-147.

[9] Record: Vol.III, p.107 @line 17 - p.108 @line 22.

tions, such dismissal including claims of other than monetary injury, on ground of failure to exhaust administrative remedies, citing that monetary relief was available to Ferris through statutory procedure for administrative abatement and refund of property taxes at 39-1-113 and 39-10-114, C.R.S. (A&R), and that the existence of that remedy made its exercise a condition precedent to commencing a suit for declaratory order and relief.[10] Nov. 14 and Dec. 8, 1989, the trial judge affirmed oral dismissal by written order, citing solely as ground that Ferris, as a property taxpayer, had not exhausted the administrative remedy of A&R.

Ferris appealed District Court dismissal and denial of temporary injunction to the Colorado Court of Appeals. Appeal alleged error in findings of fact and conclusions

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[10] Record: Vol.III, p.111 @line 5-20.

of law, including as to facts and evidence admitted at the Nov. 8, 1989 evidentiary court hearing and those reasonable inferences, favorable to Ferris' position, that could be drawn from evidence, testimony, and facts, admitted and controverted, such that would defeat Com'rs' motions for summary judgment. That dismissal of claims made in the complaint was error was basis of appeal. Appeal raised additional federal questions of whether a state can limit means of redress for unlawful imposition of a prospective general property tax by legislative act of a board of county commissioners to the administrative remedy of A&R for individual property taxes, to the exclusion of all other remedies and statuses of citizens without violating the Equal Protection Clause of the Fourteenth Amendment United States Constitution; whether Ferris' First Amendment United States Constitution right to petition for redress of

grievances in these circumstances could be impaired without violating the United States Constitution guarantee of a republican form of government; whether administrative A&R procedure provides meaningful relief meeting minimum United States Constitution due process requirements of clear and certain remedy.

In 89CA2137 opinion not selected for publication, the Court of Appeals opined: The trial court's detailed oral findings and order disposed of the entire claim for relief, therefore, all of Ferris' contentions could be considered on appeal; county commissioners must adhere to a mandatory procedure in order to levy excess property taxes; violation of procedure constitutes an "irregularity in levying" as contemplated by statutes at 39-1-113 and 39-10-114, C.R.S., procedure for abatement and refund of property taxes (A&R); assuming Com'rs here acted in derogation of the pertinent

statutory guidelines, the tax is an illegal levy to which A&R statutes apply; circumstances here do not except Ferris from first exhausting administrative remedy of A&R, because Com'rs might cure the defect by imposing a subsequent legal levy should the tax levy be determined illegal on administrative review; it was unnecessary to address Ferris' other contentions of error (including alleged injuries and claims for relief in statuses other than property taxpayer) because of disposition of "taxpayer's" claims on jurisdictional grounds.

The Colorado Supreme Court denied Ferris' Petition for a Writ of Certiorari to the Colorado Court of Appeals.

The Federal question sought to be reviewed here is to the fundamental constitutional ground upon which the claims at issue before the trial court were based. Aspects of such question were therefore squarely

raised in the Complaint, at the outset of this action, and those same aspects and others have been subsequently raised, as error, to the Court of Appeals on appeal and to the Colorado Supreme Court in denied petition for discretionary review.

"A PUBLIC HEARING SHALL BE HELD ON A PROPOSAL TO INCREASE YOUR PROPERTY TAXES" was sole notice caption published to advertise all public hearings held (Sept. 20, Nov. 22 and 25, 1988) for Com'rs legislative adoption of "truth in taxation" procedure and the excess levy.[11] Ferris argued, as error, to the Court of Appeals: That the notice caption published for the Sept. 20, 1988 hearing, admitted into evidence just prior to oral trial court dismissal, was other than the express and exact notice caption mandated by statute for advertisement of a lawful first hearing for adoption

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[11] Record: Exhibit 1, Sections B, MM, NN.

of that procedure, "A PUBLIC HEARING SHALL BE HELD TO CONSIDER ADOPTION OF A TAXING PROCEDURE TO INCREASE YOUR PROPERTY TAXES", as per C.R.S. 29-1-303(1)(b); that since same express notice caption for adoption of the procedure was never published, the subsequent resolution to implement C.R.S. 29-1-303 procedure was not adopted at a lawfully-noticed first hearing; that Com'rs were therefore without jurisdiction to proceed with adoption of an increased levy by that procedure, and any levy adopted was invalid as per C.R.S. 29-1-303(1)(a)(b), (3); 24-6-402(4); 29-9-101(2).[12]

The complaint sought a declaratory judgment in the trial court that other notice published did not meet express statutory requirements of procedure at 29-1-303(4), (6) C.R.S. nor substantive "full and time-

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[12] APPELLANT'S BRIEF ON APPEAL (stricken), p.51-53, 107-108; CONDENSED APPELLANT'S BRIEF ON APPEAL, p. 14-15, 24-25.

ly" notice requirements at 24-6-402(2), C.R.S. Declaratory order and injunctive relief were sought by express statutory means provided at 24-6-402(6).[13] Same arguments were raised, as trial court error, to the Court of Appeals.[14] Notice of the Nov. 25, 1988 hearing was published Nov. 24 (Thanksgiving Day) and Nov. 25, 1988, the day of the hearing.[15] Neither time nor place of the November 25, 1988 hearing was published in the notice for the Sept. 20 or Nov. 22, 1988 hearings.[16] Ferris argued: That the express statutory requirement is that notice must be published on two separate dates for any hearing, for a hearing time and place fixed in the advertisement,

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[13] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.15-17, 22; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.160; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.142-144.

[14] CONDENSED APPELLANT'S BRIEF ON APPEAL, p.16-17, 24-25; APPELLANT'S BRIEF ON APPEAL (stricken), p.68-77, 107-108.

[15] Record: Exhibit 1, Section NN.

[16] Record: Exhibit 1, Sections B, MM.

the second notice expressly not more than eight days prior, and the first implicitly not less than eight days prior and expressly not less by other applicable statutory notice requirements; that since notice published did not meet such requirements, the resolution for an increased levy was not approved at hearing held pursuant to lawful notice and was therefore invalid.

The trial court orally found that the Com'rs provided proper notice of the November 22, 1988 hearing, and they

> ". . . didn't need to give anybody notice that the hearing was being continued at all. They gave as much notice as they could that the hearing was being continued to November 25, 1988, and exceeded the statutory requirements."[17]

Ferris additionally sought a declaratory

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[17] Record: Vol.III, p.110 @l.15-20.

judgment in the trial court that the exception procedure at 29-1-303, C.R.S. was for obtaining excess general operating budget revenues for one budget year only, and could not be implemented to obtain excess revenues for capital expenditures or prospective revenues, as it was here, because of the express wording of that statutory procedure, the availability of other alternative exception procedures, also at Part 3 of Article I, Title 29, C.R.S., expressly for obtaining excess revenues for such other purposes, and express statutory restrictions placed upon raising excess revenues for such other purposes.[18] Same issues were raised as error to the Court of Appeals.[19]

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[18] Record: COMPLAINT AND PETITION FOR REDRESS (stricken), p.10-17; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.138-144.

[19] APPELLANT'S BRIEF ON APPEAL (stricken), p.48-51, 53-68, 77-88, 107-108; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.13-14, 15-16, 17-20, 24-25.

The trial court orally found that procedure at 29-1-303, C.R.S. was the applicable one in these circumstances.[20] As to the above claims of unlawful taxing procedure under Part 3, Article 1, Title 29, C.R.S., raised on appeal as error, the Court of Appeals did not contemplate the factual issues of this case in light of the statutory requirements, apparently because of disposition of all claims on jurisdictional ground of failure to exhaust administrative remedy of A&R as a property taxpayer.[21] The Court of Appeals generally found this action was of the nature for which A&R procedure was intended.[22]

Ferris raised the issue to the Court of Appeals, as trial court error, that un-controverted evidence and testimony were admitted at the Nov. 8, 1989 trial court

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[20] Record: Vol.III, p.109 @line 18.
[21] 89CA2137 Opinion, p.7.
[22] 89CA2137 Opinion, p.5.

hearing from which a reasonable inference, if not proof, could be drawn favorable to the Ferris position that Com'rs' adoption of an excess mill levy at "truth in taxation" hearing was a mere "rubber stamp" of decisions made outside of public hearing and out of public "hearing."[23] The same claim had been made a part of the Complaint[24], and was argued in pleadings to vacate summary trial court dismissal.[25] At the November 25, 1988 "truth in taxation" hearing, Commissioner Pond had moved and read into the record a resolution to adopt a 4-mill increase levy and read the final vote prior to any public vote by

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[23] APPELLANT'S BRIEF ON APPEAL (stricken), p.91-110; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.21-26.

[24] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.15-17; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.158-159; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.142-144.

[25] Record, Vol.II: PLAINTIFF'S OBJECTION AND PETITION FOR REDRESS WITH AFFIDAVIT, p.412, p.415.

Com'rs.[26] Un-controverted testimony by Commissioner Pond was admitted at trial court hearing that during a recess outside the November 25, 1988 "truth in taxation" hearing, "There was a debate between the commissioners as to what mill levy might be established."[27] Subsequent to such testimony, the trial court orally ruled that 24-6-401, C.R.S., the State Open Meetings Law, was inapplicable to county commissioners; that 29-9-101, C.R.S., the Public Meetings Law, was the applicable statute and was observed; that the resolution to approve an excess mill levy was adopted at a properly noticed open and public session.[28]

Ferris raised the argument to the trial court, orally and in his pleas to recon-

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[26] Record: Vol.III, p.39 @l.21-p.40 @l.5; Plaintiff's Exhibit C, tapes 5, 6, C1; Defendants' Exhibit 2, 11/25/88, p.37.

[27] Record, Vol.III: p.24 @l.8; p.44 @l.16; p.45 @l.6; p.46 @l.6.

[28] Record: Vol.III, p.109 @l.24 - p.110 @l.10.

sider dismissal[29], and at length to the Court of Appeals as trial court error[30], that neither debate of proposed public policy by Com'rs outside public hearing, proposals not presented in public hearing, where a public vote follows same, nor public "rubber stamping" of final policy decisions reached outside of public hearing, were within the purpose of "truth in taxation" public disclosure procedures and violated express wording at: 29-1-303(5), (6), C.R.S., "truth in taxation" procedure; 24-6-402(1), C.R.S., the State Open Meetings Law; 29-9-101(1), C.R.S., the Public Meetings Law. Ferris argued that all of these statutory public hearings/meetings statutes

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[29] Record: Vol.III, p.108 @l.17-21. Vol.II: PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.382; PLAINTIFF'S OBJECTION AND PETITION FOR REDRESS WITH AFFIDAVIT, p.412, 415; PLAINTIFF'S MOTION FOR C.R.C.P. RULE 11 SANCTIONS, p.420-421.

[30] APPELLANT'S BRIEF ON APPEAL (stricken), p.95-110; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.22-25.

were applicable, and the resolution approving an excess property tax levy was adopted contrary to requirements of each and was expressly invalidated by same statutes at 29-1-303(3), (5), (6); 24-6-402(4), 29-9-101(2), C.R.S. Upon reconsideration of oral dismissal, dismissal of all claims, the trial court twice subsequently affirmed such dismissal by written order, but there cited solely, as grounds, failure to exhaust administrative remedy of A&R before bringing the action[31] - same failure jurisdictionally precluding hearing of Ferris' claims as to Com'rs' violation of statutory public meetings/hearings requirements[32]. Ferris argued, as trial court error, to the Court of Appeals that reasonable inferences, if not proof, of violation of "truth in taxation" hearings requirements, of the State Open Meetings Law, and/ or the Public

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[31] Record, Vol.II: ORDER p.424; ORDER, p.436.
[32] Record, Vol.II: ORDER, p.436.

Meetings Law could be drawn from testimony and admitted and controverted material facts, such inferences of violation negating trial court dismissal by summary judgment for failure to exhaust administrative remedies, and defeating Com'rs' motions for summary judgment on issues of public meetings.

The Court of Appeals did not address these contentions of error regarding public meetings/hearings statutes because of disposition of "taxpayer's" (Ferris) claim on the same jurisdictional ground as that for trial court's dismissal, for failure to exhaust administrative remedy of A&R as a property taxpayer.[33]

Ferris raised the contention of trial court error to the Court of Appeals that in these circumstances of unlawful imposition of a general property tax by legislative

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[33] 89CA2137 Opinion p.7.

act of Com'rs, where state citizens are conferred statutory right to county commissioners' compliance with the various public meetings hearings requirements and express statutory means of redress and remedy as sought here[34] for Com'rs' noncompliance with same, that dismissal of all Ferris' claims, in all statuses, for failure to exhaust an administrative remedy for direct monetary relief only, as a property taxpayer, is effectual denial of First Amendment United States Constitution right to petition for redress in other statuses because he might have an administrative avenue of monetary relief in one status, property taxpayer. Ferris argued that such a denial of a protected right is not consistent with due process, and is repugnant to the Equal Protection Clause of United States Consti-

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[34] Record: Vol.III, p.108 @ l.15-22; Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.397, 402, 390-391.

tution, Fourteenth Amendment, Article II, Section 6 of Colorado Constitution, and the form of republican government in Colorado and the United States.[35] The Court of Appeals did not address this contention of error.[36]

The argument was made to the trial court prior to and after dismissal[37], and raised as error to the Court of Appeals[38] that the administrative remedy of A&R is not only inappropriate for redress of the unlawful legislative acts at issue and especially so for obtaining the non-monetary relief sought in the Complaint, but that

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[35] APPELLANT'S BRIEF ON APPEAL (stricken), p.46-48; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.11-12.

[36] 89CA2137 Opinion p.7.

[37] Record: Vol.III, p.108 @l.5-22. Vol.I, COMPLAINT AND PETITION FOR REDRESS (stricken), p.20-21; Vol.I, BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.147; Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.384-400.

[38] APPELLANT'S BRIEF ON APPEAL (stricken), p.28-36; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.6-9.

such, if it is sole remedy available for redress of a grievance of any unlawful legislative conduct of a board of county commissioners in imposing a general property tax, where same commissioners are judge in their own cause, is violative of the doctrine of separation of government powers. The contention was raised in the trial court[39] and argued at length to the Court of Appeals[40], as error, that monetary relief available through administrative A&R procedure did not meet minimum Federal Due Process requirements of clear and certain remedy; that even for direct monetary injury to the status of property taxpayer the relief was not necessarily meaningful, as any taxes abated or refunded could simply

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[39] Record, Vol.III, p.107 @line 17-25. Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.389, 398-399.

[40] APPELLANT'S BRIEF ON APPEAL (stricken), p.36-43; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.9-11.

be re-levied and collected the subsequent tax year; that if the revenue resultant of the excess levy were made a prospective part of the county's revenue base, a taxpayer seeking remedy would be required to pursue the administrative A&R procedure each future year derivative levies were applied; that the statutes provided no means for overall cure of the unlawful legislative conduct subject of claims in the complaint. Ferris argued to the trial court[41] and to the Colorado Court of appeals[42] that to allow the Com'rs to legislatively impose a general property tax levy in excess of their authority is "taxation without representation" and that to restrict redress for such unlawful legisla-

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[41] Record: Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.400.

[42] APPELLANT'S BRIEF ON APPEAL (stricken), p.81; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.19; APPELLANT'S PETITION FOR REHEARING, p.5-6.

tive acts to administrative procedure for piecemeal individual monetary damages, available to property taxpayers only, is repugnant to United States and Colorado Constitutions. The trial court found that Ferris has available a simple remedy of money damages through A&R.[43] The Court of Appeals opined that such a construction would render the statutory language of A&R meaningless and circumstances here do not except Ferris from first exhausting such administrative remedy, because the Commissioners might cure the defect by imposing a subsequent legal levy were the tax levy determined illegal on administrative review.[44]

Each and all the above stated claims and arguments made in the trial court and raised, as error, to the Colorado Court of Appeals were raised in Ferris' denied Peti-

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[43] Record, Vol.III: p.111 @l.5-20.
[44] 89CA2137 Opinion, p.4-5.

tion to The Colorado Supreme Court for a Writ of Certiorari to the Colorado Court of Appeals' affirmation of trial court dismissal. Ferris summarized to the Colorado Supreme Court that the Court of Appeals' zeal to protect statutory language of A&R ratifies the excessive and infirm legislative conduct at issue, resulting in an unlawful tax levy for which individual monetary relief afforded through administrative A&R procedure is sole remedy, regardless of other non-monetary injury to statuses other than and including property taxpayer; that such holding has rendered nugatory, in these circumstances, statutory guarantees of property tax revenue increase limitation and public meetings/hearings, and Constitutions' guarantees and principles of separation of powers, equal protection, no taxation without representation, and due process right to clear, certain remedy and meaningful relief; that therefore for ad-

ministrative A&R procedure to be sole remedy is impermissible under United States Constitution.[45]

REASONS FOR GRANTING THE PETITION

The legislative acts of the state government officials and the resultant tax, subject of this cause of action are "so contrary to the root philosophy of a Republican Form of Government as might cause this Court to resort to the guarantee clause of Article IV Section 4 of the United States Constitution." This case presents a fundamental constitutional issue, is of general importance, and concerns the important private right to petition the government for a redress of grievances against unconstitutional legislative acts of state government. The Colorado Court of Appeals has decided this important question of federal law in a way not in harmony with United

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[45] APPELLANT'S PETITION FOR WRIT OF CERTIORARI, p.5.

States Constitution, Article IV, Section 4, nor with other rights of Due Process and Equal Protection guaranteed by the Fourteenth Amendment. The question of whether the unlawful imposition of a general tax by legislative act of local state government officials, in excess of statutory limitations imposed on their taxing power, violates the constitutional guarantee of a republican form of state government, and whether redress for such may be impaired and limited solely to an administrative proceeding for individual direct monetary injury to taxpayers, has not been, but should be, settled by this Court. Because the tax levy was adopted in a manner facially in excess of statutory authority, the core issue of this petition is sovereignty of law. While tangential arguments of due process and equal protection can be made in attempting to reach the sovereignty doctrine, it can only be reached directly, in

this case, through the Guarantee Clause. This Court could here reconsider the doctrine that all questions involving the Guarantee Clause are by definition political.

I. THE REPUBLICAN GUARANTEE

The issue presented here is that the legislative conduct of state government officials in the adoption of a general property tax, and the resultant tax, are violative of the express laws of the state, and therefore such circumstance is violative of the republican guarantee at Article IV, Section 4, United States Constitution. Adjudicating sovereignty of state law does not present a challenge that Colorado state government is not republican in form - challenging the state as a state. The challenge is to the legality of governmental conduct and to the tax as a tax - That the tax and conduct is contrary to congressional guarantees enabling statehood. As to various claims of lawfully insufficient notice and

procedure, the law and facts facially show that the challenged legislative enactment of a general tax exceeds the specific statutory, and therefore constitutional, limitations imposed upon the Com'rs' taxing and spending power. That the challenged enactment exceeds Com'rs' lawful discretion is alleged on further grounds of statutory taxing limitation and on other statutory ground of excessive conduct that is not necessarily a tax matter. A challenge on such issues is non-political in nature. The question, as presented, is justiciable, for reasons explained in Pacific Telephone Co. v. Oregon, 223 U.S. 118 @150, but should additionally be found justiciable on the ground that subject conduct and tax violate Article IV, Section 4, United States Constitution, for which a citizen's right to petition for redress may not be impaired. While cause of action here does not solely arise out of injury to rights

under Article IV, Section 4, this case cannot be resolved absent recognition, tacitly or expressly, that sovereignty of law is an indispensable element of same republican guarantee. This Court could avail itself of this non-political opportunity to state that a guarantee of sovereignty of the law in legislative taxing acts of state government officials is one basic principle of the republican guarantee, for which, if violated, a citizen's right to petition for redress may not be impaired.

Sovereignty of law - the requirement that all government officials, highest to lowest, regardless of branch, must obey the law - has been recognized by this Court as essential to the form of republican government in this country. See Marbury v. Madison, 5 U.S. 137; U.S. v. Lee, 106 U.S. 196. A Modern court has been powerfully criticized for weakening the sovereignty doctrine in the case of the President. See

Justice White's dissent in Nixon v. Fitzgerald, 457 U.S. 731. Surely such immunity should not be extended to taxation by county commissioners. In return for their allegiance, all citizens of the United States may demand government in conformity with republican principles. Minor v. Happersett, 88 U.S. 162; U.S. v. Cruikshank, 92 U.S. 542. Also see generally Hamilton, "Federalist" No. 84; Madison, "Federalist" No. 44.

We were all taught from grade school that the right to be taxed in accordance with law is a fundamental constitutional guarantee. A republican government is one "which derives all its powers directly or indirectly from the great body of the people." Madison, "Federalist" No.39. Congressionally established boundaries for the form of republican government in Colorado demand a representative one where the will of the people is codified in laws passed by repre-

sentatives elected for that purpose, especially as to taxation. Through the enabling act to Colorado state government, Congress has removed any doubt whether the question raised here might be of a political nature, and therefore not justiciable for reasons in Pacific, above, where at Section 4 it is expressly stated that the constitution of the Colorado state government formed: "shall be republican in form, . . . and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence, . . ." A fundamental principle facially expressed in the Declaration of Independence is that of representative government. "Taxation without representation" is expressly deplored.

> "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . .

For imposing taxes on us without our consent."

By Congressional Declaration, the principle of "no taxation without representation" - being taxed in accordance with the laws passed by legislators elected for that purpose, expressed in The Declaration of Independence, is an indispensable part of a republican form of government and therefore a fundamental private right protected under the guarantee clause of Article IV, Section 4, United States Constitution. The guarantee that state government will be limited and delegated can only logically be to the people. To argue that the guarantee is to government officials that their powers will be limited renders it meaningless.

The principle of sovereignty of law as to taxation is so basic to the republican form of government established in this country that this Court could find that unlawful legislative imposition of a general tax by

local state government is a grievance for which the people may petition the government for redress, unimpaired; that all state citizens may demand state government in conformity with republican principles, especially as to taxation. That the issue here is an act of a local subdivision of state government unlawfully imposing a general tax by infirm legislative act should, by itself, be enough to overturn dismissal.

II. EQUAL PROTECTION AND DUE PROCESS

In these circumstances of unlawful imposition of a general property tax by legislative act, either the requirement that administrative remedy for abatement and refund of property taxes at 39-1-113 and 39-10-114, C.R.S. (A&R) be first pursued, unconstitutionally impairs a citizen's right to petition the government for a redress of grievances, or same A&R statutes do not meet minimum Unites States Constitution Fifth and Fourteenth Amendment due process

standards of clear and certain remedy that is meaningful.

Dismissal of all claims for relief here, in all statuses, for failure to first pursue administrative remedy of A&R, remedy for seeking individual monetary relief for property taxpayer status, is contrary to the doctrine of separation of government powers and violates fundamental and private guarantees of the equal protection and due process clauses of the Fourteenth Amendment; Even for the status of property taxpayer, administrative A&R provides no remedy for non-monetary injuries, does not meet minimum federal due process standards of clear and certain remedy for direct monetary injury, and the monetary remedy provided is not necessarily meaningful. If the Court of Appeals did not err in failing to reach issues of the case (for lack of jurisdiction) in upholding district court application of state law of A&R, said state

law violates Ferris' constitutional rights to petition for redress, equal protection of the laws, and due process. Therefore, said law of A&R is unconstitutional on its face; or if the Court of Appeals did err, it was applied unconstitutionally in this case because a certain status, other than state citizenship, is required to seek redress - For issues here, non-property taxpayer citizens have no less a stake in lawful government than property taxpayers. A statute can be unconstitutional as written or as explained by the state courts. Giaccio v. Pennsylvania, 382 U.S. 399.

The Court of Appeals found that this challenge was of the nature for which A&R procedure was intended, and that circumstances here do not except Ferris from first exhausting administrative remedy of A&R, because the Com'rs might cure the defect by imposing a subsequent legal levy if the tax levy were determined illegal, by Com'rs, on ad-

ministrative review; that it was therefore unnecessary to address Ferris' other contentions of error (including claims for relief in statuses other than property taxpayer) because of disposition of "taxpayer's" claims on jurisdictional grounds.

By applying A&R statutes to these circumstances, the trial and appellate courts have bypassed the constitutional questions presented by this case. Using the A&R statutes in such a manner to dispose of Ferris' claims and constitutional questions effectively ratifies the excessive and infirm governmental conduct at issue, rendering nugatory, in these circumstances, Colorado statutory guarantees of property tax revenue increase limitation and public meetings/hearings. Dismissal on ground that Ferris' First Amendment right to petition the government for redress flows solely through A&R procedure, solely as "taxpayer," has the same effect, for purposes of

appeal, as if the constitutional questions were answered erroneously, but absent an articulated answer. Such so unnecessarily complicates the equal protection and due process aspects of this case that they cannot be reached without involving the First Amendment, the Guarantee Clause, and the doctrine of conflict of laws. A&R statutes ought not to be interpreted in such a way as to defeat the clear intent of declaratory judgment and openness-and-honesty-in-government statutes. The claims here are that the governmental conduct at issue violates both general statutory rights to public meetings/hearings and those specific to legislative exception procedures for property taxation, rights that are conferred on all the general public. e.g. C.R.S. 24-6-401; 29-9-101; 29-1-303. These express guarantees are not contingent on additional status of property taxpayer. Therefore redress cannot be limited to property taxpay-

ers, as the Court of Appeals opinion effects, without violating the Fourteenth Amendment Due Process Clause, nor can remedy to citizens with additional status of property taxpayer be impaired by existence of specific remedy of A&R for such status without violating the Fourteenth Amendment Equal Protection Clause. Equal access to the courts to question the constitutional validity of legislative acts and executive fiats is a fundamental constitutional right. See Bounds v. Smith, 430 U.S. 817; United States Constitution, First Amendment; Colorado Constitution, Article II, Section 6. This Court could find that unimpaired access is essential to upholding the doctrines of sovereignty of law and separation of powers that are indispensable to a republican form of government, especially where, as here, the conduct at issue violates express statutory rights conferred to all the general public. If A&R is abso-

lute prerequisite to judicial review, non-property taxpayers are denied remedy. If so, then A&R is unconstitutional because its existence limits standing in court to challenge illegal government behavior at issue solely to property taxpayers.

An administrative A&R proceeding, before Respondent Com'rs, is not an appropriate forum for redressing same Com'rs legislative acts, and therefore judicial review cannot be impaired by its existence. See generally McKart v. United States, 395 U.S. 185. Even if A&R were available to non-property taxpayers and provided all the relief sought here, which it does not, it is contrary to the doctrine of separation of powers for a board of county commissioners to be given the courts' review powers in an administrative proceeding where same board would judge the legality and validity of its own binding legislative acts. A&R was intended to remedy grievances to dis-

proportionate share of property tax burden because of excessive assessment. Board of Assessment Appeals v. Benbrook, 735 P.2d 860 (Colo.) @868. A&R affords no remedy to non-property taxpayers, as it is unavailable to that status. Regardless of its availability, no remedy is provided for violations of public meetings/hearings statutes - only direct and individual monetary relief to property taxpayers. On the other hand, if non-property taxpayers are accorded relief from illegal government behavior, as to statutory public meetings/hearings requisites at issue, by means of declaratory judgment, as was sought here, then to deprive Ferris of the same remedy and relief accorded to non-property taxpayers, for the sole reason that he has additional status as property taxpayer, deprives him of equal protection of the law. In view of affirmed dismissal, for failure to exhaust an administrative remedy available to only

one of several alleged statuses, a citizen could be precluded from any redress or remedy simply by labeling him in such a way as to preclude statutory remedies he might have available in another status, forcing him to choose one avenue of remedy to the exclusion of all others available and other relief they might afford. This court has already decided that forcing a citizen to surrender one right in order to assert another right is intolerable. Simmons v. U.S., 390 U.S. 389. Where relief is first sought has no bearing on whether the general tax is invalid. The question is, what are the meaningful legal remedies for an invalid general tax and the illegal governmental conduct that produced it? Since there is no express or implicit provision in A&R statutes to administratively "cure" the levy, the administrative framework provides no clear and certain remedy or "cure" as to the legislative acts and the general

tax. Com'rs' only lawful means to "cure" the levy overall is only theoretically possible only for future tax collection years beyond 1989 and only in the legislative arena, not the administrative, contingent on Com'rs' majority resolution to do so. Once legislative exception procedure to the property tax revenue increase limitation was elected, a resultant levy to collect approved revenues was mandatory for budget year 1989. 29-1-303(3), (6), C.R.S. A&R applies to one property taxpayer's direct economic injury only. Right to mandatory notice and opportunity to attend, hear, and participate in hearings is conferred to the general public at 29-1-303(1)(b),(5), C.R.S., not only to property taxpayers. A&R provides no relief to individual property taxpayers for injury of being excluded from attendance and participation by flawed mandatory notice - absent, they could not necessarily know the procedure was infirm,

nor how so - and certainly provides none to citizen/electors, not property taxpayers, who suffer other than direct economic injury and to whom A&R is unavailable. Indirect economic injury by effect of levy on local consumer costs and property resale value is real. Individual refund to Ferris/taxpayer would not remedy the latter or other injury. Constitutions' "penumbrally" guaranteed principle of "no taxation without representation" is impermissible of no remedy for Ferris' personages that pay the tax indirectly. The Court of Appeals recognized a private right to individual monetary relief, but overlooked the public rights to lawful taxation and open hearing/meetings, thereby allowing Com'rs the opportunity to collect the entire amount of the excess revenue, abate and refund no net amount [39-10-114(1)(a)(I)(B)], and levy derivative taxes, as Com'rs already have, with no requirement of any public cure.

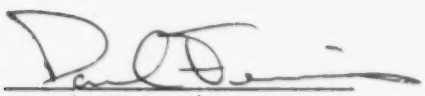
The Fourteenth Amendment Due Process Clause not only obligates the states to provide "clear and certain remedy" and "meaningful backward-looking relief to rectify any unconstitutional deprivation," but to insure that the remedy and relief are meaningful. McKesson v. Division of Alc. Bev. 495 U.S. ___. For the conduct at issue, remedy of A&R provides Ferris relief that is not clear and certain nor meaningful. A&R is a remedy for individual property taxes that have already been assessed. What remedy does A&R provide for future derivative levies if, as here, the excess revenue is made a prospective part of the county's revenue base? The future amount to be abated cannot be known, as such is contingent on future legislative setting of levies. For that circumstance, A&R is a remedy that must be pursued, annually and piecemeal, by individual property taxpayers seeking relief. Since there is no provi-

sion in A&R remedy to administratively cure the illegal tax overall, potential of a multiplicity of annual A&R proceedings does not meet "clear and certain" due process standards established in McKesson, above, nor is relief provided "meaningful."

"Truth in taxation" legislative exception procedure, whether or not successfully implemented, allows only two possible resultant levies: To collect a lawfully approved excess revenue amount; or to collect zero revenue increase. 29-1-303(3), (6), C.R.S. A&R statutes allow the total amount of revenue at issue to be collected, regardless of whether individual property taxpayers successfully petition. 39-10-114(1)(a)(I)-(B), C.R.S. The proportionate part of abated or refunded taxes, including their own, may be reassessed against successful petitioners. Thus it is constitutionally impermissible that same be sole remedy under minimum due process and meaningful relief

standards set in McKesson, above. Sole clear, certain and meaningful remedy and relief for "cure" of the injuries here is judicial review as sought.

Petitioner Paul Ferris requests this United States Supreme Court grant this petition, reverse dismissal, and enter findings for declaratory and injunctive relief sought on appeal, as to the validity of the excess tax levy at issue.



4/10/92

Paul Ferris
840 23 Road
Grand Junction, CO
81505
(303) 243-3115

Date

VERIFICATION

I, Paul Ferris, being of lawful age, and being first duly sworn upon oath, depose and state as follows:

I have drafted and read the foregoing "PETITION FOR A WRIT OF CERTIORARI," know the contents thereof, and pledge that the statements therein are true and correct to the best of my knowledge, information and belief.

DATED this 10th day of April 1992.

Paul Ferris

STATE OF COLORADO) ss.
COUNTY OF MESA)

The foregoing instrument was acknowledged before me this 10th day of April, 1992 by Paul Ferris.

Witness my hand and official seal.
My commission expires: 10-18-95

Betty Sparks
NOTARY PUBLIC

4-10-92
Date